IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION. 695 OF 2004

CONNECTED WITH

COMPANY APPLICATION NO. 192 OF 2004

In the matter of Companies Act, I of 1956;
AND
In the matter of petition to sanction the scheme of amalgamation of M/s. EOC Tailor Made Polymers India Private Limited

(Transferor Company)

M/s. EOC Tailor Made Polymers India Private Limited ... Petitioner

ALONGWITH
COMPANY PETITION NO. 696 OF 2004
CONNECTED WITH
COMPANY APPLICATION NO. 193 OF 2004

In the matter of sections 391 to 394 of the Companies Act, 1956;
AND
In the matter of Raj Prakash Chemicals Limited
AND
In the matter of scheme of amalgamation of EOC Tailor Made Polymers India Private Limited
WITH
Raj Prakash Chemicals Limited

Raj Prakash Chemicals Ltd ..Petitioner/Transferee Company

Mrs. Mona Bhide i/b. Dave and Girish and co. for the petitioner in both the petitons.

Shri C.J. Roy with R.C. Master and M.M. Goswami Panel counsels i/b. T.C. Kaushik for Regional Director, Dept. of Company Affairs, Maharashtra, Mumbai in both the petitions.

Shri R..C. Gupta, official Liquidator prsent in C.P.695/2004 only.

CORAM: S.U. KAMDAR, J.

DATE :10TH FEBRUARY, 2005.

P.C. :

1. These two company petitions are filed by the transferor company and transferee company for sanction of an amalgamation scheme under section 391 to 394 of the Companies Act-I of 1956.

2. Some of the material facts of the present case are as under:

3. On 16.3.2004 the board of directors of the transferor company passed a resolution approving the scheme of amalgamation of the transferor company being EOC Tailor Polymers India Private Limited with the transferee company known as Raj Prakash Chemicals Limited. On 6.5.2004 an

order was passed by this court for convening a meeting of the equity shareholders and creditors of the transferor company as well as the transferee company. In the said meeting a special resolution has been passed approving the scheme of amalgamation. Accordingly the present petition is moved for seeking final approval under section 391 to 394 of the Companies Act-I of 1956. All the procedural requirements for the purpose of amalgamation as contemplated under section I of the Company court rules have been complied with by the petitioner. An affidavit has been filed by the Regional Director dated 1.12.2004 and has confirmed that there are no objections except that the company should follow the procedure for reduction of capital as contemplated under section 101(2) of the Companies Act.

4. The only objection raised by the Regional Directors and which requires my consideration that under Clause (20.2)(a) of the proposed scheme for amalgamation some of the shares held by the transferor company in the transferee company will stand automatically cancelled on the scheme being sanctioned. According to the Regional Director the same amounts to reduction of share capital and

thus attracts the provision of Section 100 and 101 of the Companies Act-I of 1956. He further contends that the companies are thus required to follow the procedure contemplated under sub-section-2 of Section 101 of the said Act. By virtue of the scheme, the shares held by the transferor company amounting to 6,38,109 Equity shares out of total issued and paid up capital of 15,90,000 Equity shares the shares will stand extinguished in view of the fact that once amalgamation takes place the company cannot allot shares to itself. Thus by virtue of operation of law there will be a reduction in the share capital to the extent of 6,38,109.

5. The Regional Director has contended that though it is true that by virtue of transfer the transferor company will cease to exist and thus the transferee company in law cannot allot shares to itself. But still according to the Regional Director the same amounts to reduction in the share capital and thus it requires approval and following of the procedure contemplated under section 100 and 101 of the companies Act-I of 1956.

6. According to the petitioner the reduction in

share capital is an automatic effect of amalgamation because the shares held by the transferor company has to be cancelled since the said company will cease to exist. It is further submitted that to allot the shares held by the transferor company of the transferee company cannot be permitted in law as the company cannot allot shares to itself. According to the petitioners once there is an automatic cancellation of the shares held by the transferor company in the transferee company the said shares are required to be cancelled else the company will have to issue the shares to itself.

7. The relevant provisions of the Act which needs very interpretation reads as under :

> "S.101 (2). Where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the [Tribunal] so directs, the following provisions shall have effect, subject to the provisions of sub-section (3) :-.

(a). every creditor of the company who at the date fixed by the [Tribunal] is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction;

(b). the [Tribunal] shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims and may publish notices fixing a day or days within which creditors are not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction;

(c). where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the [Tribunal] may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the [Tribunal] may direct, the following amount-

(i) if the company admits the full amount of debt or claim, or, though not admitting it, is willing to provide for it, then, the full amount of the debt or claim;

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then, an amount

> fixed by the [Tribunal] after the like inquiry and adjudication as if the company were being wound-up by the [Tribunal].

8. This sub-section (2) of section 101 is a subject matter of interpretation before me in the present case. The question which is posed before me is whether in cases of an automatic cancellation of share holding of a transferor company by virtue of amalgamation with the transferee company the provision of sub-section (2) of section 101 of the Companies Act-I of 1956 are to be complied with or not ?

9. The learned counsel for the petitioner has relied upon a judgement of the Madras High Court in the case of **Asian Investments Ltd (1992) CC 517** as well as judgement of Calcutta High court reported in **Mcleod and Co. and ors. vs. S.K. Ganguly and Ors (1975) CC 563.** By relying upon the aforesaid two judgments the learned counsel for the petitioner has contended that it is not necessary to follow

the prescribed procedure of sub-section (2) of section 101 of the Companies Act-I of 1956 in cases where reduction of share capital is automatic by virtue of operation of law. The respondent has on the other hand relied upon the judgement of this court in the case of **PMP Auto Industries Ltd reported in 1994 (80) CC 289** and has contended that in cases of amalgamation under section 391 to 394 of the Companies Act the procedure prescribed for reduction of share capital cannot be dispensed with.

10. Before I deal with the rival submissions of the parties it is necessary that the provisions of section 101 which requires an interpretation must be analysed. The said sub-section (1) of section 101 inter-alia provides for a passing of a resolution by the company for reducing the share capital and after passing of such a resolution the company is required to obtain an order from the court granting confirmation of such a resolution. Sub-section (2) of section 101 inter-alia provides for three eventualities for which a special procedure prescribed thereunder is required to be followed. In a case where a proposed reduction of share capital involves such a diminution of liability in respect of unpaid share capital

or the payment of any shareholder of any paid-up share capital then in that event the provision prescribed in sub-section (2) thereof is required to be complied with. The third eventuality contemplated is wide enough to cover all cases since the words used are ‘in any other cases’. In so far as the third eventuality is concerned the court is vested with a discretion whether to direct a party to follow the provisions of sub-section (2) sub-clause (a), (b) and (c) or not to direct the compliance thereof. In the present case admittedly there is no question of diminution of any liability in respect of unpaid share capital nor there is a situation where the payment is made to any shareholder out of any paid-up share capital. However the learned counsel appearing for the Regional Director has contended before me that reduction of share capital even if by virtue of automatic operation of law results in the shares of the transferor company being extinguished by virtue of amalgamation and thus the provisions of sub-section (2) of section 101 are attracted by virtue of the third category, i.e., ‘any other case’. The learned counsel has further contended that though there is a discretion for the court in the third category of the case still the court cannot grant dispensation of the

provisions of sub-section (2) of section 101 of the Companies Act. On the other hand as far as of the provisions of sub-section (2) of section 101 are concerned I am of the opinion that the words appearing 'in any other cases' must necessarily be read ejusedem generis with the words preceding in other cases. It is because only if the reduction in share capital is likely to affect the interest of the creditors adversely to him then the provisions which are provided in sub-section (2) of section 101 that either his consent can be obtained or his objections can be heard and considered by the court. The object for which the provision is inserted would be defeated if cases of reduction of share capital is taken in to account by virtue of the word 'any other case' appearing in sub-section (2) of section 101. Thus the power of the court to direct compliance of the procedure particularly in the case like the present one where by virtue of operation of law there is a necessity to reduce the share capital is not necessary. The shares held by the transferor company in the transferee company cannot continue to exist by virtue of the amalgamation and extinguishment of a transferor company. In my view to hold that even in such cases the provision of sub-section (2) of section 101 must be

necessarily followed would be inappropriate and would amount to stretching the word ‘any other case’ beyond the intent and object of the provisions of sub-section (2) of section 101 of the Act. There is one more angle which should be taken into consideration while interpreting the provisions of sub-section (2) i.e. if the word ‘any other case’ is wide enough to cover all kinds of reduction in share capital including the reduction which necessarily arises due to amalgamation of the company then in my opinion the earlier part of the sub-section (2) of section 101 would be redundent as the word ‘any other case’ would also include the cases where there is a diminution of the liabilities in respect of the unpaid share capital or where the payment is made to any shareholder of any paid-up share capital. Thus before exercising the discretion in the third category of the cases which falls in ‘any other case’, the court must take into consideration and account whether the procedure should be directed to be complied with or not and while doing so it should take into consideration whether in that particular case interest of the creditors is affected or not. the aforesaid view which I have taken is also fortified by the judgement of the Madras High court as under :

. This clause has become necessary in view of the statutory prohibitions contained in section 42 and section 77 of the Act. The object of section 42 is to maintain the separate operational identity of a holding company and its subsidiaries and thereby preserve the respective shareholder's control on them

Section 77 imposes a restriction on purchase by a company of its own shares. It is not necessary that extinguishment of shares in all cases should necessarily result in reduction of share capital. Section 100 will not come into play where the scheme of amalgamation contemplate the transfer of assets and liabilities of the transferor company to the transferee company. In such a case, in my view, there is no release of assets. the assets of the transferor company, on amalgamation stand transferred to and vested to the transferee company, on amalgamation, stand transferred to and vested in the transferee-company.

Further, rule 85 of the Companies(court) Rules, 1959 which is part of the scheme of section 101 and section 102 of the Act, provides that where a proposed compromise or arrangement involves reduction of capital of the company, the procedure prescribed by the Act and the rules relation to reduction of capital shall be complied with before the compromise or arrangement as far as it relates to reduction of capital is concerned. It is therefore, evident that section 101 and section 102 and rule 85 would stand attracted only to cases of compromise or arrangement involving reduction of capital and not to cases of amalgamation simpliciter when the entirety of the assets and liabilities are transferred and when there is no release of any assets.

The object of asking for confirmation by the

court of reduction of capital is to safeguard the interest of the creditors of the company. In the instant case, the resolution approving the scheme of amalgamation was unanimous. There was no voice of protest from any quarter, The scheme is a comprehensive and consolidated scheme. It is peculiar case of amalgamation where a holding company is amalgamated with a subsidiary company. Therefore, I am clear in my mind that the contention raised by Mr. Venkathalamoorthy is not well founded. As already mentioned, this case on hand is not a case where there is reduction in capital. Further, the procedure prescribed under sections 101 and 102 read with rule 85 do not stand attracted to a case of scheme of amalgamation, where there is no release of assets but which involves transfer of all the assets and liabilities.

11. However the learned counsel for the Regional Director has brought to my attention the judgement of this court reported in PMP Auto Industries (1994) Vol-80 289 and particularly the following para which reads as under :

". thus the position in law appears to be clear. Section 391 invests the court with powers to approve or sanction a scheme of amalgamation/arrangement which is for the benefit of the company. In doing so, if there are any other things which, for effectuation, require a special procedure to be followed-except reduction of capital-then the court has powers to sanction them while sanctioning the scheme itself. It would not be necessary for the company to resort to other provisions of the Companies Act or to follow other procedures prescribed for bringing about the changes requisite for effectively implementing the scheme which is sanctioned by

> the court. Not only is section 391 a complete code as held by the courts."

13. According to me the provisions under section 101 would not apply in case where there is a reduction in the share capital of the company by virtue of amalgamation of two companies and in case where the transferor company held the shares in the transferee company. In view of the aforesaid position in law, I find that there is no merit in the objection raised by the Regional Director in the present case. I accordingly make both the petitions absolute in terms of prayer clause (c) to (f).

14. The Official Liquidator has filed his report and he has no objection to the approval of the said scheme.

SD/-

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